Paper No. ____
Filed December 1, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD

MYLAN PHARMACEUTICALS INC., TEVA PHARMACEUTICALS USA, INC., and AKORN INC.[1]
Petitioners,
v.

ALLERGAN, INC.,
Patent Owner.

Case IPR2016-01127 (8,685,930 B2)
Case IPR2016-01128 (8,629,111 B2)
Case IPR2016-01129 (8,642,556 B2)
Case IPR2016-01130 (8,633,162 B2)
Case IPR2016-01131 (8,648,048 B2)
Case IPR2016-01132 (9,248,191 B2)

COMMENTS OF *AMICI CURIAE* DEVA HOLDING A.S. IN RESPONSE TO THE BOARD'S INVITATION FOR *AMICUS* BRIEFS REGARDING THE TRIBE'S MOTION TO TERMINATE

[1] Cases IPR2017-00576, IPR2017-00594, IPR2017-00578, IPR2017-00596, IPR2017-00579, IPR2017-00598, IPR2017-00583, IPR2017-00599, IPR2017-00585, IPR2017-00600, IPR2017-00586 and IPR2017-00601 have respectively been joined with the above-captioned proceedings. The word-for-word identical paper is filed in each proceeding identified in the above caption pursuant to the Board's Scheduling Order (Paper 10).

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I. IDENTITY OF INTEREST OF *AMICI CURIAE*

DEVA Holding A.S. ("DEVA") is a Turkish company involved in a pending lawsuit in the United States District Court for the Eastern District of Texas filed by Allergan, Inc. ("Allergan") against DEVA, Civil Action No. 2:16-cv-1447-WCB ("the Pending Litigation"). In this action, Allergan alleges that Deva's proposed generic version of the Restasis® Product, which is the subject of an Abbreviated New Drug Application filed by DEVA with the United States Food and Drug Administration, will infringe United States Patent Nos. 8,629,111, 8,633,162, 8,642,556, 8,648,048, 8,685,930, and 9,248,191 ("the Patents-in-Suit"). DEVA asserts that the Patents-In-Suit are invalid or not infringed by its ANDA product. The Pending Litigation is in its early stages, with the parties presently engaged in fact discovery and trial set for October 15, 2018. Recently, Allergan and Deva jointly submitted a stipulation to the Court regarding claim construction, without participation of the Saint Regis Mohawk Tribe ("the Tribe").

Because the Board provides limited procedural guidance regarding a filing of this nature, we respectfully submit these comments to assist the Board's evaluation of the Tribe's Motion to Terminate these IPR proceedings. In Paper 96, the Board authorized any interested *amici curiae* to file briefing on the pending Motion to Terminate by December 1, 2017. We certify that no party or its counsel

to the above-captioned Board proceedings authored these comments in whole or in part, no such party or its counsel contributed money intended to fund the preparation or submission of these comments, and no person other than the *amici* contributed money intended to fund the preparation or submission of these comments.

II. ARGUMENT

A. The Tribe's and Allergan's actions in related litigation belie their claims in these Board proceedings that Allergan and the Tribe lack identical interests, and Allergan cannot represent the Tribe in its absence.

Actions speak louder than words. In its Corrected Motion to Terminate (Dkt. 81 at 16), the Tribe argues that it is an indispensable party under the Board's identity-of-interest test. Specifically, the Tribe *says* that the Board cannot proceed "in the absence of the Tribe because Allergan and the Tribe do not have identical interests, and Allergan cannot represent the Tribe in its absence." (*Id*.) In support of that argument, the Tribe further says that claim construction positions "might" serve Allergan's interest differently than the Tribe's or that the Tribe might "desire to not risk the validity of the Patents-at-Issue." (*Id*. at 22.) Despite these hollow words, the most recent actions by Allergan and the Tribe in the Pending Litigation against DEVA speak volumes to the contrary.

In the Pending Litigation against DEVA, Allergan acted by filing a letter with the Court on September 8, 2017 stating that "[t]his morning, Allergan assigned its rights in a number of patents, including the patents-in-suit, to the Saint Regis Mohawk Tribe." (Pending Litigation, D.I. 44-1.) Allergan further states that "Allergan does not anticipate that this assignment will have any impact on the litigation or the issues before the Court, other than it expects to join the Tribe as a co-plaintiff in due course." (*Id*.) Here is whereAllergan's and the Tribe's

inconsistent positions before this Board and the district court become apparent. On one hand, in the Pending Litigation against DEVA, Allergan itself informs the Court that it does not anticipate that the Tribe's involvement "will have any impact on the litigation or the issues before the Court." But on the other hand, the Tribe argues to this Board that it may need to take claim construction positions competing with Allergan.

Just as important, since the September 8, 2017 letter to the Court, neither Allergan or the Tribe have asked that the Tribe be joined as a co-plaintiff to the Pending Litigation. These actions by Allergan and the Tribe demonstrate that they understand and agree that Allergan can and is, in fact, currently representing the Tribe's identical interests in matters relating to the patents-in-suit. This is also confirmed by the License Agreement stating that Allergan, not the Tribe, retains control over litigation. (EX2087 §§ 5.1.1., 5.2.2., 5.3.)

The most telling example showing that, for all practical purposes, Allergan's and the Tribe's interests are identically aligned concerns the recent joint filing by Deva and Allergan regarding claim construction in the Pending Litigation. Even after the filing of the Corrected Motion to Terminate on September 22, 2017 (Dkt. 81) and corresponding Reply brief on October 20, 2017 (Dkt. 93) with the Board, on November 10, 2017, Deva and Allergan filed a Joint Motion for Stipulation Concerning Claim Construction with the court in the Pending Litigation. (Pending

Litigation, D.I. 47). Noticeably absent from this filing is the Tribe as a named party, let alone any allegation that the Tribe may potentially have a competing claim construction. This filing action by Allergan, coupled with the filing inaction by the Tribe on a substantive issue, clearly demonstrates that the Tribe's interests are identically aligned with those of Allergan, despite their hollow arguments to the contrary before the Board.

B. The Tribe's and Allergan's actions in other related litigation belie their claims that Allergan and the Tribe lack identical interests, and Allergan cannot represent the Tribe in its absence.

The words of Allergan and the Tribe before the Board are not only hollow and inconsistent with their actions in the Pending Litigation against DEVA, they are equally inconsistent with actions taken in other district court litigations. As recognized by the Tribe in its Reply (Dkt. 93 at 4), the United States District Court for the Eastern District of Texas recently invalidated all asserted claims of the Patents-In-Suit in a different action before Judge Bryson, *Allergan et al. v. Teva et al.*, 2:15-cv-1455-WCB (E.D.Tex.). (EX. 1165.) In response to this judgment, the Tribe *says* "Allergan could choose not to appeal the district court opinion and thereby avoid paying any additional royalties to the Tribe, which potentially total more than $100,000,000." (Dkt. 93 at 4). Those arguments to this Board again are inconsistent with the *actions* of Allergan and the Tribe, when a mere seven days later they jointly filed a notice of appeal with the Federal Circuit on October 27,

2017. *Allergan et al. v. Teva et al.*, 2:15-cv-1455-WCB (E.D.Tex.) (D.I. 527). This again demonstrates that the interests of Allergan and the Tribe are identical for all practical purposes and the Tribe's Motion to Terminate should be denied.

III. CONCLUSION

For the foregoing reasons, we respectfully submit these comments and respectfully request the Board to deny the Tribe's Motion to Terminate.

Respectfully submitted,

Dated: December 1, 2017

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. §42.6(e)(4) and 42.205(b), the undersigned certifies that on December 1, 2017, a complete and entire copy of COMMENTS OF AMICI CURIAE DEVA HOLDING A.S. IN RESPONSE TO THE BOARD'S INVITATION FOR AMICUS BRIEFS REGARDING THE TRIBE'S MOTION TO TERMINATE was provided, via electronic service, to the Petitioners and Patent Owners by serving the correspondence address of record as follows:

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